Supreme Court, U. S.
FILED
OCT 4 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5211

JOHN W. WILKE, TRUSTEE IN BANKRUPTCY
FOR WILLIAM S. EDGEMON, BANKRUPT,
Petitioner,

vs.

KYLE F. BROOKS AND WILLIAM CODY KELLY,
TRUSTEES, AND WILLIAM CODY KELLY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

S. ARTHUR SPIEGEL
Counsel for Petitioner

PAUL NEMANN
Of Counsel

300 Atlas Bank Building
Cincinnati, Ohio 45202
(513) 421-4020

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE	5
REASONS FOR GRANTING THE WRIT	11
APPENDIX A	1a
APPENDIX B	17a

CITATIONS

Cases: Page

Broadcast Music v. Havana Madrid Restaurant Corp., 175 F.2d 77 (2nd Cir. 1949) 15

Brown v. Ford Motor Company, 479 F.2d 521 (5th Cir. 1973) 15

Browning v. Crouse, 356 F.2d 178 (10th Cir. 1966) 15

Chesapeake & Ohio Railway Company v. Martin, 283 U.S. 209, 75 L.Ed. 983 (1931) 14, 15

Dudley v. United States, 428 F.2d 1196 (9th Cir. 1970) .. 15

Mack v. Dailey, 3 F.2d 534 (2nd Cir. 1924) 15

Powers v. Continental Casualty Company, 301 F.2d 386 (8th Cir. 1962) 15

Quock Ting v. United States, 140 U.S. 417, 35 L.Ed. 501 (1891) 12, 15

Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 43 L.Ed. 492 (1899) 13, 15, 16

Southeastern Canteen Co. v. C.I.R., 410 F.2d 615 (6th Cir. 1969) 11, 16

Spero-Nelson v. Brown, 175 F.2d 86 (6th Cir. 1949) 15

Sun Life Assur. Co. of Canada v. Stacks, 187 F.2d 17 (7th Cir. 1951) 15

Statutes:

11 United States Code

Sec. 96(a) 3, 11

Sec. 96(b) 10

28 United States Code – Sec. 1254(1) 2

Florida Statutes – Sec. 608.32 .....3, 4, 6

Miscellaneous:

8 A.L.R. 796 .....12, 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

———

No. ———

———

JOHN W. WILKE, TRUSTEE IN BANKRUPTCY FOR WILLIAM S. EDGEMON, BANKRUPT,
Petitioner,

vs.

KYLE F. BROOKS AND WILLIAM CODY KELLY, TRUSTEES, AND WILLIAM CODY KELLY,
Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

The petitioner, John W. Wilke, Trustee in Bankruptcy for William S. Edgemon, Bankrupt, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on April 17, 1975. A petition for rehearing by the Sixth Circuit was denied in an order filed July 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 515 F. 2d 74 (6th Cir. 1975), and appears at Appendix A, infra pp. 1a to 16a. The order denying a petition for rehearing in the Sixth Circuit Court of Appeals was filed July 10, 1975, without opinion. Judgment in the United States District Court was filed on May 1, 1973, without opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit herein sought to be reviewed was entered on April 17, 1975. A petition for rehearing filed by the petitioner herein was denied by the Court in an order filed July 10, 1975. The petition herein was filed less than ninety days from the date of the order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

This suit was brought by a trustee in bankruptcy to recover a preference. The main issue concerned when the transfer of certain assets occurred. The defendant contended that the transfer took place four years prior to bankruptcy when the stock certificates of Monastery Gardens, Inc., previously owned by the bankrupt, were allegedly transferred to the defendant as security for a debt and pursuant to an agreement between them. The Trustee-petitioner contended that the transfer did not occur until the defendant perfected his security interest by obtaining the receipts of the sale of Monastery Gardens, Inc., within four months of the filing of bankruptcy. Alternatively, the Trustee contended that, even if the transfer did occur, the defendant was estopped from claiming ownership of the stock because of his negligence in allowing the bankrupt to appear as the owner of the corporation. The jury returned a verdict for the Trustee. On appeal, the United States Court of Appeals for the Sixth Circuit in a two-to-one opinion reversed and entered final judgment for the defendant, saying that the trial judge should have directed a verdict for the defendant because the evidence that the transfer of stock took place as alleged by the defendant was clear, convincing and uncontradicted and could not be rejected by the jury.

The questions thereby arising are:

Where the evidence of the transfer of stock consisted of testimony given by interested witnesses, who were impeached on other matters; where there were elements of fraud involved in the transactions; where there were omissions and inconsistencies in the accounts of the transactions; where the evidence regarding the transfer of stock was not entirely consistent or clear; and where the plaintiff-Petitioner put on substantial evidence which raised permissible inferences that the transfer of stock did not take place as alleged by the defendant, was the Court of Appeals correct in concluding that the uncontradicted testimony of the defendants could not be rejected by the jury?

Where the defendant had failed to file with the Secretary of State of the State of Florida certain information required by Florida Statute Section 608.32, which information would have given notice that the bankrupt was no longer in control of the corporation, and where creditors of the bankrupt relied on the bankrupt's continued ownership and control of the corporation to their detriment, and where the defendant was aware of the reliance said creditors had in the bankrupt's continued ownership, is the defendant estopped from claiming ownership of the corporation or a perfected security interest prior to the time he actually took possession of the assets of the corporation?

STATUTORY PROVISIONS INVOLVED

11 U.S.C. Sec. 96. *Preferred creditors*

> "(a)(1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such detbor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

"(2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of the petition.

"(3) The provisions of paragraph (2) of this subdivision shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred and whether or not there are or were persons who might have become bona fide purchasers of such real property."

Vol. 2, U.S.C., page 2092.

Vol. 2, Florida Statutes, 1963

Section 608.32 *Annual report of corporation; contents.*—
"(1) All corporations heretofore or hereafter incorporated in this state and all foreign corporations heretofore or hereafter authorized to do business in this state are required to file with the secretary of state on or before July 1st of each year a sworn report, on such form as the secretary of state shall prescribe, giving: (a) the name of each officer and director and his post office address, (b) the home office of the corporation, (c) the name and address of the resident agent upon whom service of process may be made, (d) the main line of

business engaged in by the corporation, (e) the date of the last meeting of its board of directors, (f) whether the corporation has been actively engaged in business during the previous twelve months or if its charter powers have been dormant and unused during that period, (g) the number of the shares of the capital stock of such corporation with the par value thereof, (h) the total amount of capital stock, and if a foreign corporation the amount of its capital stock allocated for use in the state, (i) such other information as may be needed to show whether the corporation is active or inactive, and (j) such other information as may be necessary for the secretary of state to have in carrying out the provisions of this section and Section 608.33."

STATEMENT OF THE CASE

In the early 1950's William S. Edgemon, the bankrupt, and his partner, Raymond Moss, purchased an 11th Century monastery from the William Randolph Hearst Estate which they had shipped to North Miami, Florida. The monastery operation was incorporated as Monastery Gardens, Inc., of which Edgemon and Moss were the major shareholders.

In 1961 Edgemon became indebted to defendant Kelly and on May 31, 1962, Kelly and Edgemon executed an agreement (D. Exh. #5) which provided, among other things, that Edgemon agreed to transfer all the stock of Monastery Gardens, Inc., to Kelly.

Whether Edgemon transferred the stock to Kelly in 1962 was the primary question in the case.

Edgemon testified that he assigned his stock certificates for 1000 shares to Kelly (App. 38, 39). (References are to the Appendix filed in the United States Court of Appeals for the Sixth Circuit and certified by the Court of Appeals to the Supreme Court.) However, an examination of the stock records of the corporation (P. Exh. 46 and 58) shows that at no time prior to 1966 was Edgemon the owner of 1000 shares of the corporation.

Brooks, Kelly's lawyer, testified generally that the 1962 agreement was carried out (App. 561), but did not directly testify that Edgemon had transferred his shares to Kelly in 1962.

Contrary to the Sixth Circuit's opinion, Kelly did not testify regarding the transfer of shares in 1962.

It should be pointed out here that all three witnesses who testified to the transfer were interested persons, Kelly and Brooks being parties to the litigation and Edgemon having his financial interest affected by the outcome of the case (Brooks, App. 504-507).

The stock certificate which Kelly claimed to have received from the corporation in 1962 for Edgemon's stock (D. Exh. 14) was an apparent forgery, as the Secretary's signature thereon was not authentic (Hays, App. 225).

Under the agreement between Kelly and Edgemon of May 31, 1962, Kelly was authorized to elect a new board of directors and officers of the corporation. He claims to have done so (Kelly, App. 470). Section 608.32 of the Florida Statutes requires that every corporation must file by July 1 of each year a sworn statement which, among other things, includes the names of the officers and directors of each Florida corporation (Brown, App. 325). Kelly failed to do this (Kelly, App. 472).

Meanwhile, Edgemon, from 1962 until the liquidation of the assets of the corporation on December 28, 1966, continued to serve in the same fashion as always, as President of the corporation along with William E. Hayes, who was the general manager of the corporation, who served as a director and Secretary, and Edgemon's personal secretary who was the Vice President, Treasurer and third director of the corporation (Edgemon, App. 49, 50). This information was furnished to the Secretary of State of Florida (Brown, App. 332). During this entire period, Edgemon held himself out to the world as the owner of the corporation (Brown, App. 312, 407-409; Hayes, App. 312).

In August of 1964 Edgemon apparently assigned his stock interest in the corporation as security for a personal debt to James Ulrich (Edgemon, App. 68, 70, 72 and 73), who, together with his attorney, Charles Brigham, journeyed to Florida, having called a shareholders meeting of the corporation (Brigham, App. 293; Brown, App. 313; Hayes, App. 207). They arrived in Miami on the day following Hurricane Cleo. At this time the corporation was in serious financial straits, foreclosure proceedings having been commenced by one of its creditors who held a second mortgage (Brown, App. 317). Ulrich was prevailed upon to acquire the second mortgage, and a third mortgage on the corporate real estate was placed of record to secure the personal debt owed him by Edgemon (Brown, App. 319).

There was no inquiry by Kelly as to the damage sustained by the monastery in Hurricane Cleo.

In the fall of 1964 Edgemon wrote to Kelly that he was commencing negotiations for the sale of the monastery:

> "I am working on a deal to sell the monastery to the Episcopal Church and I would like to see you at your earliest convenience. * * *" (P. Exh. 74).

Edgemon received an acknowledgment of his letter from Kelly's secretary (P. Exh. 75), but no response from Kelly (Kelly, App. 468). In December of 1964 Edgemon, as the principal stockholder, director and chief executive officer, caused the Monastery Gardens, Inc. to enter into a written agreement with the St. Bernard Foundation, a non-profit charitable Florida corporation, for the sale of the corporate assets, being the ancient Spanish monastery and its contents (P. Exh. 6). The terms of the purchase agreement provided for the payment of $350,000.00 at the initial closing to be held December 28, 1964, plus an additional sum not to exceed $400,000.00 to be payable 29 months later out of the proceeds of a fund-raising campaign to be conducted by professionals. The agreement further provided that if the fund-raising campaign was unsuccessful, that the St. Bernard Foundation, Inc.

had the option of retaining the monastery upon the payment to Monastery Gardens, Inc. of the difference between that which had already been paid to it out of the proceeds of the fund-raising campaign and $225,000.00, or to cancel the contract and reconvey the aforsaid monastery to Monastery Gardens, Inc., subject to a first mortgage for the $350,000.00 paid by it at the initial closing (Brown, App. 320).

At the initial closing on December 28, 1964, everyone who participated believed that Edgemon was the principal stockholder, director and chief executive officer of Monastery Gardens, Inc. These included not only George E. Brown, the attorney for Monastery Gardens, Inc. (Brown, App. 309, 334) and the attorney for the Moss Estate, to which Edgemon was indebted (Brown, App. 312), but also William E. Hayes (Hayes, App. 211), who had been working for Edgemon in the monastery for many years, and to whom Edgeman was indebted, and also Henry G. Simmonite, the attorney for the Episcopal Diocese of South Florida and the St. Bernard Foundation with whom Edgemon had negotiated the sale. The records of the Secretary of State of Florida at that time stated that Edgemon was the President, Mildred Pendery, his personal secretary, was Vice President and Treasurer, and William E. Hayes was Secretary of the corporation, and that Edgemon, Pendery and Hayes were the directors, with the resident agent of the corporation being George E. Brown (P. Exh. 67, App. 336).

In June of 1965 Kelly learned of the sale of the monastery and made inquiry through his lawyers in Florida, who were informed by Mr. Brown, attorney for the corporation, that there had been at least three different groups of owners of the corporation – Edgemon, Muccia and Moss, then Ulrich, and now Kelly (Brown, App. 334, 335). Neither Kelly nor his lawyers did anything about the situation from September of 1965 to June of 1966 other than to press Edgemon for payment of his debt to Kelly (Brown, App. 344). Then there was a gap between June, 1966, until October, 1966 (Brown, App. 345).

In April of 1966, Edgemon indicated to Kelly's lawyers that he was judgment-proof and would consent to a judgment being taken against him if it would help Kelly's tax picture (P. Exh. 16; Brooks, App. 515, 516).

In the fall of 1966, Kelly and his lawyers and Edgemon pressed the St. Bernard Foundation to close the transaction before the end of the year, five months earlier than called for in the written agreement of December 11, 1964 (Brown, App. 343). At this time it was evident that the fund-raising campaign was a failure, so that under the written agreement the St. Bernard Foundation had the option of either paying $225,000.00 and completing the transaction or deeding back the Monastery Gardens, Inc. property subject to the $350,000.00 mortgage. Kelly insisted upon a settlement whereby the St. Bernard Foundation would pay $125,000.00 series "C" general obligation bonds of the Trustees of the Episcopal Diocese of South Florida and $55,000.00 in cash, to Monastery Gardens, Inc., or a reduction of $45,000.00 from the purchase price provided in the written agreement (Brown, App. 343).

Less than a month before the final closing on December 7, 1966, Kelly and his attorneys were not clear as to his status, as noted in the correspondence between Kelly's lawyers and other representatives at the closing (P. Exh. 79; Brooks, App. 541).

Before coming down to Florida for the closing on December 28, 1966, Kelly's lawyers agreed with Attorney Eugene P. Ruehlmann that they would pick up $15,000.00 of the bonds to be received at the closing, and deliver them to Mr. Ruehlmann on behalf of a client of Ruehlmann's who had been defrauded by Edgemon (Brooks, App. 523; Wilke, App. 182).

At the closing, the documentation indicates that Edgemon was the principal stockholder, although it was the theory of Kelly and his attorneys that Kelly was selling his stock interest to the Monastery Gardens corporation in exchange for the assets received by the corporation from the St. Bernard Foundation (Kelly, App. 488, 489 and 494). The docu-

mentation at the closing was wholly inconsistent with Kelly's theory and, in fact, there was no written agreement between the corporation and Kelly to substantiate the basis on which Kelly received the bonds and cash at the closing (Barron, App. 573). All of the documents of Monastery Gardens, Inc. at the closing were executed by Edgemon in his capacity as stockholder and in his capacity as President and a director of the corporation (P. Exh. 31, 32, 33, 37, 44; Edgemon, App. 59, 60).

Brooks obtained a release from Edgemon for the $15,000.00 worth of bonds that he turned over to Ruehlmann on the day of the closing or shortly thereafter (P. Exh. 42; Brooks, App. 552). Edgemon filed his voluntary petition in bankruptcy on January 30, 1967, several weeks later (Edgemon, App. 44).

Throughout this whole period, the following creditors of Edgemon relied upon his ownership of Monastery Gardens, Inc.: Ulrich, who was paid his personal debt owed by Edgemon out of the proceeds of the first closing in December of 1964 on his third mortgage; Hayes, who was not paid all he was entitled to under his written agreement with Edgemon (Hayes, App. 278); the Moss Estate represented by Brown to which Edgemon owed a substantial sum; and other creditors who Edgemon admittedly talked to (Edgemon, App. 92, 93).

After a demand on Kelly by the Trustee was refused, suit was filed by the Trustee to recover the bonds and cash. Jurisdiction in the United States District Court for the Southern District of Ohio was based on Section 60(b) of the Bankruptcy Act, 11 U.S.C. Section 96(b). The main issue in the litigation concerned when the transfer took place. Defendants Kelly and Brooks claim that it occurred over four years before the filing of the bankruptcy, and plaintiff, Edgemon's Trustee in Bankruptcy, asserts that it occurred less than five weeks before bankruptcy when the corporation was liquidated and the assets thereof were turned over to defendants Kelly and Brooks for Edgemon's account. This case, therefore, turns on the application of Section 60(a)(2)

of the Bankruptcy Act (11 U.S.C. 96(a)(2)), which defines transfer for the purposes of the preference statute:

> "(2) For the purposes of subdivision (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at a time when it became so far perfected that no subsequent lien upon such property obtained by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. ° ° °"

Judgment was rendered for the plaintiff-Trustee for $193,-200.00 plus interest at 6% from May 1, 1973, based on a jury verdict.

Defendants appealed to the United States Court of Appeals for the Sixth Circuit which reversed on a split decision, holding that the District Court erred in denying defendants' motion for a directed verdict.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with applicable decisions of the United States Supreme Court and with decisions of other United States Courts of Appeal; and there is an apparent conflict between Courts of Appeal requiring that the question presented herein be settled by this Court.

Citing *Southeastern Canteen Co.* v. *CIR*, 410 F. 2d 615 (6th Cir. 1969), the Sixth Circuit held, in the present case, that the testimony of Edgemon, Kelly and Brooks regarding the transfer in 1962 of Edgemon's shares of Monastery Gardens, Inc. stock was the kind of clear, convincing and uncontradicted testimony which, when supported by other evidence introduced at trial, could not be rejected by the jury. The Court decided that the case should have been taken from the jury, despite the fact that all three witnesses testi-

fying regarding the transfer were interested in the outcome of the case and that Edgemon and Kelly were both impeached on other parts of their testimony, which is acknowledged in the Court's opinion, and that Brooks had signed corporate minutes that were improperly dated.

Thus, there is presented here the question of whether the jury has the right to weigh and reject uncontradicted testimony where the witnesses are interested in the outcome of the litigation, where the credibility of the witnesses has been brought into question, and where additional reasons exist for rejecting the testimony.

The history of how courts have dealt with this question is a fascinating study in judicial legerdemain.

One astute commentator has stated:

> "The credibility of witnesses is for the jury; but they may not be permitted to run away with the case. All agree that the jury must not believe impossibilities. Beyond this, there is no rule generally applicable. As applied to uncontradicted testimony, there are two broad rules: One, that the uncontradicted testimony of a witness is for the jury; the other that the jury may not arbitrarily reject the uncontradicted testimony of a witness; and the courts apply one or the other as they mean to leave the matter to the jury, or to interfere." 8 A.L.R. 796-797.

The United States Supreme Court has dealt with the issue on a number of occasions. The Supreme Court in *Quock Ting* v. *United States*, 140 U.S. 417, 35 L.Ed. 501 (1891), stated the rule as follows:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the Court, but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the

> absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. All of these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced." 140 U.S. at 420, 421, 35 L.Ed. at 502.

Again, the Supreme Court in *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 43 L.Ed. 492 (1899) in discussing the rule that the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, stated that "the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." 172 U.S. at 408, 43 L.Ed. at 495.

The *Sonnentheil* case is particularly relevant to the present case. The main question there was whether a deed of trust had been accepted by the creditors listed in the deed. There was uncontradicted testimony by certain creditors listed in the deed that they had accepted the deed of trust and that there was no fraud involved. They were all apparently interested, however, in sustaining the deed. The trial court let the question go to the jury, and the Supreme Court upheld this. The Court stated that, "It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. • • • Parties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless

the door be swung wide open for the admission of all testimony having any possible bearing upon the question." 172 U.S. at 410, 43 L.Ed. at 496.

Although the petitioner is not suggesting that the present transfer was a fraudulent transfer, the petitioner does assert that the evidence shows that there were fraudulent elements in the transaction, such as the preparation of the corporate minutes for the years 1963 to 1966 within the span of one or two weeks, (Kelly, App. 366, 370; Tholl, App. 371-379), the forged Stock Certificate No. 15 issued to defendant Kelly, and the transactions between Edgemon and Ulrich.

In *Chesapeake & Ohio Railway Company* v. *Martin*, 283 U.S. 209, 75 L.Ed. 983 (1931), the Supreme Court again dealt with this issue. The fact question here involved what was the reasonable time for delivering certain freight. The defendant's employee had testified as to the reasonable time, and his testimony was totally uncontradicted. On the basis of this testimony, the defendant demurred to the evidence. The trial court let the case go to the jury and the jury found for the plaintiff.

The Supreme Court of Appeals of the State of Virginia affirmed but the United States Supreme Court reversed, holding that even though the witness was an employee of the defendant, his uncontradicted testimony could not be disregarded. The Court indicated that the agent's testimony as to the reasonable time for delivery was reasonable upon its face and in accordance with probability, wholly unchallenged and completely corroborated by the undisputed facts. The witness here was not shaken by cross-examination, nor impeached, and the Court said that it was difficult to see why, if inaccurate, the testimony could not have readily been shown to be so.

The Court acknowledged the general rule that the credibility of an interested witness must always be submitted to the jury but indicated that it had been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here.

Quock Ting and *Chesapeake & Ohio Railway Company*, although at opposite ends of the spectrum, are clearcut cases and their holdings can be easily followed in cases where the facts are as onesided. In *Sonnentheil*, however, there is a much closer question as to whether uncontradicted testimony should go to the trier of fact.

The United States Courts of Appeal and other Federal and state courts have had difficulty applying the guidelines set down by the Supreme Court in the cases discussed above. And, many of the decisions of the Courts of Appeal appear to be in conflict with decisions of other circuits and with the above-cited cases.

A number of the circuits have adopted the rule that uncontradicted testimony cannot be disbelieved by the jury even though the testimony is that of an interested witness. See, *e.g. Brown* v. *Ford Motor Company*, 479 F.2d 521 (5th Cir. 1973); *Dudley* v. *United States*, 428 F.2d 1196 (9th Cir. 1970); *Browning* v. *Crouse*, 356 F.2d 178 (10th Cir. 1966); *Mack* v. *Dailey*, 3 F.2d 534 (2nd Cir. 1924).

It is difficult to reconcile these cases with the Court's decision in *Sonnentheil*.

Other Circuits have ruled that uncontradicted testimony of an interested witness goes to the trier of fact. See, *e.g. Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F.2d 77 (2nd Cir. 1949); *Sun Life Assur. Co. of Canada* v. *Stacks*, 187 F.2d 17 (7th Cir. 1951); *Powers* v. *Continental Casualty Company*, 301 F.2d 386 (8th Cir. 1962).

For additional cases showing the conflict between various state and federal courts on this issue, see Annotation, "Disregarding Uncontradicted Testimony in Civil Actions," 8 A.L.R. 796.

The Sixth Circuit itself has made inconsistent pronouncements regarding this issue. In *Spero-Nelson* v. *Brown*, 175 F.2d 86 (6th Cir. 1949), the Sixth Circuit cited the *Sonnentheil* case as authority for the proposition that, "The fact that a witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to

a jury as a question of fact," 175 F.2d at 90. But, in *Southeastern Canteen Co.* v. *C.I.R.*, 410 F.2d 615 (6th Cir. 1969), which is the case the Court relied on in its opinion in the present case, the Court made the following statement: "But, this is not to say that clear, convincing and uncontradicted testimony can be ignored just because of the interest of the witness," 410 F.2d at 624.

The present case provides the opportunity for the Supreme Court to clarify the law on this difficult issue.

The Petitioner contends that the present case should be controlled by the Court's holding in *Sonnentheil.* The Sixth Circuit's reliance on their decision in *Southeastern Canteen Co.* v. *C.I.R.*, 410 F.2d 615 (6th Cir. 1969), is misplaced. The holding in *Southeastern Canteen* appears to be inconsistent with the Court's decision in *Sonnentheil,* and even if the *Southeastern Canteen* case was correct, it should not be controlling here.

In *Southeastern Canteen,* the only basis the trier of fact had to disbelieve the uncontradicted testimony was that the witness was interested.

In the present case, the uncontradicted testimony was that of interested witnesses — Kelly and Brooks were parties to the suit and Edgemon would have been subjected to further personal liability if the plaintiff in the present case prevailed (Brooks, App. 504-507). The credibility of these witnesses was in issue as is acknowledged in the opinion of the Court below. And, as can be seen from the statement of the facts herein, there were other factors present here requiring that this case be decided by the jury: there were elements of fraud in the transactions; there were omissions and inconsistencies in the defendants' accounts of the transactions; and the plaintiff-Petitioner put on substantial evidence which raised permissible inferences contradictory to the defendants' evidence.

These factors require, as this Court required in *Sonnentheil,* that the trier of fact have the opportunity to determine what weight the uncontradicted testimony was to be given.

The Petitioner further points out to the Court that there was a second basis for the jury's verdict in the case — estoppel.

The plaintiff-Petitioner's argument on estoppel was that even if Kelly became an owner of the corporation or a secured creditor of Edgemon under the terms of the 1962 agreement, by Kelly's negligence in allowing Edgemon to appear as the owner of the corporation, he was estopped from claiming ownership of the corporation or the perfection of the pledge by the transfer of Edgemon's stock to him in 1962. The Petitioner contends that the record contains adequate evidence for the jury to conclude that all the elements of estoppel were established.

Finally, the Petitioner refers the Court to the strong dissent to the Sixth Circuit's opinion in this case. Judge Edwards, the dissenting judge, saw the real question in this case as whether the record is devoid of evidence to support the plaintiff's claim, and concluded that this was properly a case for the jury.

Where four judges, three Appellate and the District Court Judge, have viewed the evidence and two have decided that reasonable minds could differ, removing the case from the jury results in a great disservice to our system of law which provides for resolution of factual disputes by juries.

Respectfully submitted,

S. ARTHUR SPIEGEL
Counsel for Petitioner

PAUL NEMANN
Of Counsel

300 Atlas Bank Building
Cincinnati, Ohio 45202

(513) 421-4020

APPENDIX A

No. 74-1026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. WILKE, Trustee in Bankruptcy for William S. Edgemon, Bankrupt,

Plaintiff-Appellee,

v.

KYLE F. BROOKS and WILLIAM CODY KELLY, Trustee, and William Cody Kelly,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 17, 1975.

Before: EDWARDS and ENGEL, Circuit Judges, and GRAY, District Judge.*

ENGEL, Circuit Judge, delivered the opinion of the Court, in which GRAY, District Judge concurred. EDWARDS, Circuit Judge, (pp. 15a-16a) filed a separate dissenting opinion.

ENGEL, Circuit Judge. This is an appeal by defendants[1]

* Hon. Frank Gray, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

[1] Kelly and Brooks are trustees of a trust set up for Kelly's benefit several years ago. After Kelly received certain stock from the bankrupt, William Edgemon, in 1962, he turned it over to the trust. Thus the proceeds of the sale of the Monastery Gardens, Inc. stock, the subject of the alleged preference, were received by Kelly and Brooks as trustees for Kelly. Hereinafter, references to defendant will refer to Kelly.

from a judgment rendered upon a jury verdict in favor of the trustee in bankruptcy for William S. Edgemon, for $193,-200, in an action alleging an illegal perference under § 60(b) of the Federal Bankruptcy Act [11 U.S.C. § 96(b)]. The complaint alleged that defendant Kelly received $125,000 in general obligation bonds and $30,000 in cash shortly before Edgemon's bankruptcy, that this "transfer" was made in violation of § 60 of the Bankruptcy Act and that Kelly should, therefore, be required to turn over the amount received to the trustee. At the conclusion of the proofs at trial, the district judge refused defendant's motion for a directed verdict and submitted the case to the jury which returned a verdict for the plaintiff trustee. On appeal, defendant assigns as error the refusal of the district judge to grant his motion for directed verdict and refusal to grant his subsequent motion for judgment notwithstanding the verdict. He also assigns as error the admission of certain hearsay evidence which he claims requires a new trial, and alleges there was insufficient proof of damages to support the amount of the jury verdict.

Because we conclude that the district court erred in denying defendant's motion for directed verdict, we do not reach the other issues raised by defendant on appeal.

The controversy arose out of the dealings of the defendant Kelly and the bankrupt, William E. Edgemon, in Florida in the 1950's and 1960's. In the early 1950's, Edgemon and his partner, Raymond Moss, purchased and had shipped to North Miami, Florida an 11th Century Spanish monastery which they then had incorporated as Monastery Gardens, Inc., and opened as a tourist attarction.[2] In 1961 Edgemon became sole owner of the shares in the corporation, buying out the other shareholders.

Later in 1961, Edgemon became indebted to defendant

[2] The monastery was originally owned by William Randolph Hearst who had acquired it in Spain and had it shipped to this country. The monastery was stored in a warehouse during the depression and purchased by Edgemon and his partner Moss from Hearst's estate in the early 1950's.

Kelly as a part of a deal involving land near Sarasota, Florida. As a result of this indebtedeness, Edgemon and Kelly entered into a written agreement on May 31, 1962 by which Edgemon agreed to turn over the stock of Monastery Gardens, Inc. to Kelly. Under the agreement, if Edgemon failed to pay Kelly the full amount of indebtedness by Sept. 1, 1962, Kelly was free to sell the stock. While the language of the agreement is couched in terms of outright transfer of the stock, it is clear that the parties intended that the transfer of stock constitute a security arrangement, since if Kelly were ever to sell the stock, Edgemon would get any amount received in excess of the debt owed and would conversely be liable for any deficiency if the stock was sold for an amount less than the amount of the debt. The agreement also authorized Kelly to elect a new board of directors of the corporation.

After the May, 1962 agreement was entered into, Edgemon continued to serve in his capacity as President of the corporation until its liquidation in December, 1966. During this period, he apparently had full control of the corporation with Kelly taking only a passive role in running the corporate affiairs. In August, 1964, Edgemon made a second and obviously fraudulent transfer of his stock interest in the corporation to a James Ulrick to secure a personal debt owed by Edgemon to Ulrick. Later in that year, Edgemon began negotiating with the St. Bernard Association, a non-profit corporation formed by the Episcopal Diocese of South Florida, for the sale of Monastery Gardens, Inc. Edgemon, by letter, informed Kelly of these negotiations.

In December of 1964, Edgemon, purporting to act in the capacity of owner and president of Monastery Gardens, Inc., entered into an agreement with the St. Bernard Foundation for the sale of the assets of the corporation. Under the terms of the agreement, the Ulrick mortgage was paid off out of an initial $350,000 paid by the Foundation. In addition, the Foundation was to later pay an additional amount of between $225,000 and $400,000 for the corporation, depending on the

success of a fund-raising campaign. The Foundation also retained the option to cancel the contract.

Kelly apparently never knew of the Ulrick mortgage and first learned of the sale of the corporation in June, 1965. About a year later, Kelly, through his lawyers, began to press the St. Bernard Foundation to close the transaction entered into under the 1964 agreement by the end of 1966, five months earlier than the original agreement called for. The Foundation's fund-raising program had not gone well and Kelly agreed to settle for $125,000 in bonds of the Episcopal Diocese of South Florida and $55,000 in cash, $45,000 less than the 1964 written agreement had called for. A closing was held on December 28, 1966. At this closing, Kelly received $110,000 of the general obligation bonds and $30,000 in cash allegedly for his stock interest in the corporation. Shortly thereafter in January 1967, Edgemon filed a voluntary petition in bankruptcy. After appointment of the trustee and his discovery of the foregoing transactions, the trustee in bankruptcy demanded that Kelly return the bonds and cash. When Kelly refused, this action was commenced.

The main issue raised on appeal is the claim that the district judge erred in refusing to grant the defendant's motion for a directed verdict at the end of the evidence. Our standard of review of a denial of such a motion is clear:

> "To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict . . . An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F. 2d 1095 (6th Cir. 1971).

In cases involving an alleged illegal preference under § 60 of the Bankruptcy Act, the burden of proof is on the trustee to prove each element of the preference as defined in § 60. *First National Bank of Negaunee* v. *Fox*, 111 F. 2d 810 (6th Cir. 1940); 3 Colliers on Bankruptcy pp. 1123. Section 60(a)(1) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1) provides:

> "Preferred creditors .
>
> (a)(1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Although appellant Kelly contends that the trustee failed to meet his burden of proof on several of the requisite elements of the preference, the key issue here is whether the trustee has proved that the "transfer" occurred within four months of bankruptcy. Kelly contends that the transfer occurred in 1962 when the stock certificates and record were transferred to him following execution of the May 31, 1962 agreement. The trustee, on the other hand, contends that the transfer did not occur until Kelly perfected his security interest by obtaining the cash and bonds in December of 1966. This date, if controlling, would place the transfer within the four month period, and hence, render it voidable at the suit of the trustee. Additionally, the trustee claims that even if it was shown that Kelly's interest in the stock was perfected, under Florida law he was estopped from asserting the claim by negligently permitting Edgemon to appear for all intents and purposes as owner of the corporation.

Section 60(a)(2) of the Bankruptcy Act [11 U.S.C. § 96 (a)(2)] provides:

> "For purposes of subdivision a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at a time when it became so far perfected that no subsequent lien upon such property obtained by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. . . ."

It therefore becomes necessary to determine whether Kelly's interest in the stock ever became "so far perfected" that no subsequent lien obtained on a simple contract could become superior to that of Kelly, and if so, whether this occurred within four months of Edgemon's bankruptcy.

On oral argument before this court, counsel for both parties acknowledged that under Florida law a security interest in stock may be perfected by transfer of the endorsed certificates by the pledgor to pledgee. This is currently the law in Florida under Fla. Stats. 679.9-305.[3] Under that section of the Florida Uniform Commercial Code, a security interest in stock is perfected by possession alone. Cf. *Schulz* v. *Schulz,* 478 S.W. 2d 239 (Tex. Civ. App. 1972) wherein the Texas Court of Civil Appeals, interpreting the identical provision of the Texas Uniform Commercial Code, held that a perfected security interest in stock could be created by taking possession of the stock alone.

We realize that the Florida Uniform Commercial Code, § 679.9-305, is not applicable to this case since it was enacted

---

[3] § 679.9-305 A security interest in letters of credit and advices of credit [§ 675.5-116(2)] goods, instruments, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee received notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

subsequent to the time the alleged pledge of stock occurred. However, we think it is instructive that the framers of the Florida U.C.C. did not perceive that they were in any way changing the prior law of pledge applicable in Florida, but merely codifying .that law. The Florida Code Comments, published by then Assistant Attorney General Sam G. Harrison, Jr., one of the chief framers of the Florida code, state the legislative intent thus:

> "This section retains the common law rule of perfecting a security interest by possession, followed in Florida. *Spellman* v. *Beeman,* 70 So. 589, 70 Fla. 575."

Although Florida case law on the perfection of pledges of stock prior to enactment of the U.C.C. is scarce, it appears that Florida followed the common law rule that delivery of the endorsed stock certificates constituted a perfected pledge. In *Landy* v. *Nicholas,* 221 F. 2d 923 (5th Cir. 1955), the Fifth Circuit in a case applying Florida law stated:

> "Stock certificates, insurance policies, and savings bank books may be the subject of pledges by delivery alone." 221 F. 2d at 929.

Viewed in the light most favorable to the trustee, we conclude the evidence is nevertheless overwhelming that the transfer of the certificates took place in 1962 as alleged by defendant. First, Edgemon himself testified that the transfer of certificates occurred in 1962. Brooks also testified that the agreement of May 31, 1962 was carried out. Finally Kelly testified that a physical transfer of the stock certificates took place in 1962. In addition, documentary evidence introduced at trial indicates the transfer took place as alleged. For example, plaintiff's exhibit #76, a letter from Edgemon to Kelly dated February 3, 1965, indicates that the stock certificates and company books had already been transferred to Kelly and that Edgemon would like them back sometime if he was able to pay off the indebtedness that he owed Kelly.

While not disputing that all of the direct testimony indicates that the transfer of the certificates took place in 1962, the trustee nevertheless asserts that the jury was not required to believe it, citing *Goldman* v. *CIR*, 388 F. 2d 476 (6th Cir. 1967), *Lakewood Manufacturing Co.* v. *CIR*, 453 F. 2d 451 (6th Cir. 1972), *Andrew Jergens Co.* v. *Conner*, 125 F. 2d 686 (6th Cir. 1942), *Goodyear Tire and Rubber Co.* v. *FTC*, 101 F.2d 620 (6th Cir. 1939).

Goldman and Lakewood Manufacturing, supra, were tax cases in which appellants argued that the tax court had erred in rejecting unrebutted testimony of the taxpayer. We find *Goldman* to have no relevance here, since in that case there was conflicting evidence on the key issue of the fair market value of certain gifts made by taxpayer to a charitable organization. In *Lakewood, supra,* the key issue was the reasonableness of compensation paid to the president of a closely held family corporation. This court upheld the tax court determination that the salary paid to the president was unreasonable, although the only testimony on this issue was that of the taxpayer's witnesses. The court properly determined that the ultimate fact question of reasonableness should be determined from all the evidence, including corporate earnings, dividends, and the duties actually performed by the president and other company personnel.

Goodyear Tire & Rubber Co. v. *FTC, supra,* involved review of an FTC cease and desist order charging Goodyear and Sears with price discrimination in violation of § 2 of the Clayton Act. A corporate officer testified that the price differentials in question had been made in good faith, and this testimony was not controverted or impeached. The court, in dicta, stated that such testimony, though uncontroverted, might be rejected by analysis of the evidence as a whole.

Andrew Jergens Co. v. *Conner, supra,* involved the alleged overpayment of excise taxes by the taxpayer. Again, the taxpayer was the only witness to testify as to whether he had paid the tax or passed it on to customers. The court held that taxpayer's very general testimony, though uncontradicted,

was not the type of "very clear and decisive evidence" which taxpayer was required to present to meet his burden of proof.

We do not believe that the cases cited by the trustee support his contention that the jury here was free to reject the uncontradicted testimony which was offered at trial. In this case a contract was introduced into evidence which indicated that the transfer of stock certificates was part of the 1962 agreement of Edgemon and Kelly. Three witnesses, Edgemon, Kelly, and Brooks, testified that the agreement was consummated and that the transfer of stock certificates took place as called for under the agreement. This testimony was uncontradicted, although testimony of Edgemon and Kelly on other matters was impeached. In addition, certain documentary evidence introduced at trial supported the contention that the stock transfer took place in 1962.

We think that these factors serve to distinguish the cases cited by the trustee. Unlike *Goldman* or *Lakewood,* the testimony offered here was not simply the opinion of a witness on an ultimate fact issue such as "reasonableness" or "fair market value". Rather, it was testimony as to *facts* which occurred and which were within the knowledge of the witnesses. In addition, this case differs from the *Andrew Jergens Company* case in that here appellant did not have an extraordinary burden of proof to meet in order to sustain his position. Finally, unlike the suggestion in *Goodyear,* the evidence here taken as a whole in no way contradicts the testimony offered by the witnesses in question. Rather the evidence taken as a whole is consistent therewith. We think that the evidence presented here was the kind of "clear, convincing and uncontradicted testimony" which, when supported by the other evidence introduced at trial, could not be rejected by the jury. *Southeastern Canteen Co.* v. *CIR*, 410 F. 2d 615 at 624 (6th Cir. 1969).

The trustee also relies upon certain evidence elicited at trial which, if it does not contradict the direct testimony concerning the 1962 transfer of stock, nevertheless creates grave doubt that such agreement was ever completed, and justifies

the jury's rejection of the direct proof to the contrary concerning the transfer.

Specifically, the trustee notes that certificate No. 15 delivered to Kelly contained the forged signature of Hayes, Secretary of the corporation.[4] Under Florida Statutes § 608.41, each stock certificate issued by the corporation must be signed by the president or vice president *and* signed by the secretary or treasurer of the corporation. If the secretary's signature was a forgery, then certificate No. 15 would be invalid.

Our conclusion that all of the evidence indicates that the "transfer" for purposes of § 60 took place in 1962 does not hinge upon the validity or invalidity of certificate No. 15. Kelly obtained a perfected security interest in the stock by taking possession of the certificates previously issued to Edgemon and endorsed by him. Assuming that Kelly may have been the victim of a forgery, this does not affect the security interest he had in the valid and endorsed certificates.

In addition, the trustee notes that although the 1962 agreement called for Kelly to elect a board of directors, the evidence was in conflict as to whether he ever did so. Further, the evidence indicated that Kelly failed ever to file certain corporate reports which the trustee argues, under Florida law, he was required to file. F.S.A. § 608.32.

We do not perceive any of the facts cited by the trustee, even when taken as completely true, as sufficient to support a finding by the jury that the transfer of stock did not take place as was testified. While the facts cited by the trustee indicate that Kelly did not take an active interest in the affairs of the corporation after receiving the pledge of stock in 1962, this is not inconsistent with his position as a secured creditor.

---

[4] Certificate No. 15 purported to represent 1,000 shares of Monastery Gardens, Inc. stock issued to Kelly by the corporation. It was signed by Edgemon as president of the corporation and by Hayes as secretary, although the Hayes signature was an apparent forgery. The certificate was transferred to Kelly by Edgemon along with the stock certificates previously issued to Edgemon and endorsed over to Kelly pursuant to their May, 1962 agreement.

The jury could believe that Kelly never exercised his right under the 1962 agreement to elect a board of directors, or if he did elect a board, that he never exercised control over the management of the corporation. In addition, the jury could believe that Kelly never caused to be filed any of the annual reports which § 608.32 requires the corporation to file. However, these facts are not inconsistent with Kelly's position as a secured creditor and in no way impeach the testimony that the transfer of certificates took place in 1962. That Kelly never exercised his right of control over the corporation by electing a board of directors to protect his interests does not diminish the security interest he already had through possession of the stock in the company. There was no credible evidence from which the jury could conclude that the transfer of the certificates did not take place in 1962 as testified to by several witnesses. Thus, absent an issue of estoppel or waiver, the verdict in favor of the trustee must be reversed since he had failed to prove an essential element of his cause of action.

The trustee's "estoppel theory" is summarized in his brief as follows:

> "Assuming, which we deny, that Kelly became a secured creditor of Edgemon under the terms of the 1962 agreement, his negligence in permitting Edgemon to appear as owner of the corporation, and not perfecting his position until he actually got possession of the securities and cash at the closing on December 28, 1966, under the doctrine of estoppel and waiver places the 'transfer' at the latter date."

We accept as a correct statement of Florida law, the definition of equitable estoppel used by the Fifth Circuit in *Minerals and Chemicals Phillip Corporation* v. *Milwhite Co.*, 414 F. 2d 428 (5th Cir. 1969), citing the Florida cases of *Aetna Casualty and Surety Co.* v. *Simpson*, 128 So. 2d 420 (D.C.A. Fla. 1961) and *Richards* v. *Dodge*, 150 So. 2d 477 (D.C.A.

Fla. 1963). In *Minerals*, the Fifth Circuit, quoting from Aetna, stated the Florida doctrine of estoppel as follows:

> "The essentials of equitable estoppel are (1) words and admissions, or conduct, acts and acquiescence, or all combined causing another person to believe a certain state of things, (2) in which the person so speaking, admitting, acting or acquiescing did so wilfully, culpably, or negligently, and (3) by which such other person is or may be induced to act so as to change his own previous position injuriously. The parties sought to be estopped must be guilty of conduct which amounts to . . . concealment of material facts at a time when he has knowledge, actual or constructive, of the real facts."

In asserting that Kelly was chargeable with "[the] failure to speak when under some duty to speak", *Richards* v. *Dodge*, *supra*, at 481, plaintiff relies upon Florida Statute 608.32(1)[5] which imposes upon corporations in Florida a duty to file with the Secretary of State an annual report giving the name of each officer and director of the corporation and his address.

---

[5] **608.32 Annual report of corporation; contents**

(1) All corporations heretofore or hereafter incorporated in this state and all foreign corporations heretofore or hereafter authorized to do business in this state are required to file with the secretary of state on or before July 1st of each year a sworn report, on such form as the secretary of state shall prescribe, giving (a) the name of each officer and director and his post office address, (b) the home office of the corporation, (c) the name and address of the resident agent upon whom service of process may be made, (d) the main line of business engaged in by the corporation, (e) the date of the last meeting of its board of directors, (f) whether the corporation has been actively engaged in business during the previous twelve months or if its charter powers have been dormant and unused during that period, (g) the number of the shares of the capital stock of such corporation with the par value thereof, (h) the total amount of capital stock, and if a foreign corporation the amount of its capital stock allocated for use in the state, (i) such other information as may be needed to show whether the corporation is active or inactive, and (j) such other information as may be necessary for the secretary of state to have in carrying out the provisions of this section and § 608.33.

Under § 608.34[6] of the Florida Statute, such a report becomes a public record. Plaintiff alleges that even assuming that Kelly became the owner or pledgee of the stock in 1962, as a director of the corporation with control over it, he had a duty to file the annual report called for by § 608.32. Plaintiff urges that Kelly's failure to perform this duty should estop him from asserting any security interest in the corporation until the 1966 closing. We cannot agree.

Ordinarily a pledgee of stock is under no obligation to make known to anyone his interest in the stock pledged by filing a financial statement or otherwise. See *Uniform Commercial Code Comment Fla. Stat.* 679.305. Possession of the stock is considered sufficient notice to other creditors of his interest. Here, however, Kelly became more than a mere pledgee of the stock under the 1962 agreement. Under that agreement, he had the right to elect a board of directors to run the corporation. While he had this right under the agreement, and does in fact claim to have elected a board of directors, it is not disputed that Edgemon continued to run the corporation with Kelly assuming a passive role.

Neither party has cited any relevant legislative history to aid us in deciding whether Fla. Stat. § 608.32 can be said to impose upon Kelly a "duty to speak" in this situation.

While no doubt one purpose of this cited Florida statute is the protection of creditors of the corporation, we fail to see

---

[6] **608.34 Duties of secretary of state**

The secretary of state shall prescribe the form and furnish the blanks upon request to make the annual reports called for in § 608.32, examine the reports when received and if the information called for is given in such reports, he shall file the same as information and keep such reports as public records. He shall pay into the state treasury to be used for such purposes as the legislature may determine all moneys collected under the provisions of § 608.33. He shall cause a notice of the requirements of §§ 608.32, 608.33, to be mailed to the last known address of every corporation doing business in the state which shall fail to file within thirty days after July 1st, the report required by § 608.32 or pay the capital stock tax imposed by § 608.33. Added Laws 1953, c. 28170, § 1.

how it has anything to do with protection of the creditors of a stockholder. As a pledgee, Kelly did all that was required by Florida law to perfect his security interest and give other creditors notice thereof. No creditor of Edgemon could have been misled as to Edgemon's claimed ownership of the corporation if he had asked to see the certificates of stock, since they were in Kelly's possession. Any liability of Kelly as a director of the corporation for failure to comply with Fla. Stat. § 608.32 does not concern us here. Even assuming that Kelly possessed the right under the agreement to take a more active role in the corporation affairs, and assuming further a breach of his statutory duty toward the corporation, we are cited no authority to suggest that Kelly had a duty to give notice to anyone of his lien on the Edgemon stock beyond that implicit in his possession of it. We, therefore, conclude that the estoppel theory was not applicable upon the proofs in the case and that it should not have been submitted to the jury.

Accordingly, because the trustee has failed as a matter of law to prove that the "transfer" for purposes of § 60 took place within the four-month period prior to bankruptcy, the judgment of the district court must be reversed and the case remanded for entry of judgment for defendant.

EDWARDS, Circuit Judge, dissenting. With great respect for the opinion of the court, I nonetheless dissent from setting aside the verdict of the jury. The opinion of the court is a clear, thorough and accurate statement of Florida's law (applicable to this contract) relative to transfer of ownership of stock and relative to the doctrine of estoppel. But a review of the District Judge's charge convinces me that he, too, understood the applicable Florida law and provided the jury with all of the essentials of that law which were necessary to their decision.

The real question, as I see the matter, is whether this record is (as the court's opinion appears to hold) devoid of evidence to support plaintiff's claims 1) that the transfer of the bankrupt's interest in Monastery Gardens, Inc., to defendants took place within four months of bankruptcy and when defendants knew or should have known he was bankrupt, or 2) that defendants' conduct in leaving the bankrupt in absolute control of the property misled other creditors to their detriment so as to estop defendants from relying upon the defense of their asserted 1962 title to the stock.

Our question on review of the District Court's denial of a directed verdict is whether the factual record so overwhelmingly points to a conclusion favoring defendants that reasonable minds cannot disagree. 5A J. MOORE, FEDERAL PRACTICE ¶50.02[1], at 2320-30 (2d ed. 1974). The Supreme Court has also stated the standard of review thus in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*:

> The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.[6]

---

[6] As Professor Moore has indicated, "In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made. On Appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against

whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." 5 Moore's Federal Practice 2316 (2d ed., 1951). See *Pawling* v. *United States*, 4 Cranch 219; *Gunning* v. *Cooley*, 281 U.S. 90; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U.S. 29. Cf. *Smith* v. *Reinauer Oil Transport*, 256 F. 2d 646, 649 (C.A. 1st Cir.).

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

But here the assets which were transferred to defendants (admittedly within four months of the bankruptcy petition) were assets paid by a third party to the bankrupt as president of Monastery Gardens, Inc., and this transaction was completed in this form with defendants' full knowledge and consent. In addition, clearly defendants permitted the bankrupt successfully to pose as both the president and the owner of the Monastery Gardens, Inc., thus enabling the bankrupt to divert corporate assets through at least one obviously fraudulent transaction in order to satisfy the bankrupt's personal obligation and also to do business with the appearance of affluence with others, including some of the current claimants in this bankruptcy proceeding.

While the cold written record which we review as an appellate court may be read as favoring defendants, I cannot escape the force of the propositions that our system of law provides for resolution of fact disputes by juries, that it is a jury's prerogative to determine the credibility of the witness, and that a jury verdict should not be set aside if there is evidence (including inferences from evidence) which supports the verdict.

I would affirm the judgment.

APPENDIX B

No. 74-1026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. WILKE, Trustee in Bankruptcy for
William S. Edgemon, Bankrupt,
Plaintiff-Appellee,

v.

KYLE F. BROOKS and WILLIAM CODY KELLY, Trustees,
and WILLIAM CODY KELLY,
Defendant-Appellants.

ORDER

(Filed July 10, 1975)

Before: EDWARDS and ENGEL, Circuit Judges, and GRAY, District Judge*

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard in banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

* Hon. Frank Gray, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.